No. 11,117

United States Circuit Court of Appeals

For the Ninth Circuit

CLIFFORD J. JUDD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

In the opening brief of appellant, three points are relied upon for a reversal of the judgment:

(1) That the information does not state sufficient facts to charge appellant with any crime against the United States, for the reason *inter alia* that it does not allege even in general terms that the United States District Court for the District of Nevada had any jurisdiction of the case of United States v. Clifford J. Judd and William N. Beatty, a witness, in which case it is charged that appellant did endeavor to influence, intimidate and impede by force and threats.

(2) That the court had no jurisdiction to try appellant on the information because the same was verified by one who admittedly had no personal knowledge of the facts therein contained, and was based, therefore, on the veriest hearsay.

(3) That the district court committed error in admitting incompetent evidence to which appellant duly excepted.

The brief of the government has just been served upon us this 28th day of March, 1946. The cause is set for argument on the morning of April 2, and all briefs should be on file by that time. The time usually allowed by the rules for the filing of a reply brief has been cut in two, and it is necessary, therefore, that this answer to the brief of appellee be written at a sitting, if it is to be printed, served and filed by the time set for the argument. We shall do our utmost to thoroughly answer the contentions of the appellee in the scant time that we have for that purpose.

I.

THE INFORMATION IS INVALID AND THE CONVICTION OF APPELLANT THEREON IS VOID FOR LACK OF THE NECESSARY JURISDICTIONAL AVERMENTS

We doubt if any lawyer would have the temerity to contend that appellant could have been legally convicted of endeavoring to intimidate a witness without proof that an action was pending over which the court, where the attendance of the witness was required, had jurisdiction, and the United States Attorney recognized the necessity of such proof by offering in evidence a certified copy of the indictment in the case of United States v. Judd and Beatty

at the very outset of the trial. It is contended, however, in the brief for appellee, that it was not necessary to plead in the Information the facts on which the jurisdiction of the court for the District of Nevada was based, or even to aver generally that the case was one within the jurisdiction of that court. Two cases are cited by learned counsel for the government as upholding the sufficiency of such a pleading. In *Davey v. United States,* 208 Fed. 237, the question is not discussed at all, the court merely using the language quoted by counsel,—language which is but the *ipse dixit* of the court, without any reasoning or citation of authorities. The case of *Nye v. United States,* 137 Fed.(2d) 73, was based on facts dissimilar to those in the case at bar, as appears from the following statement contained in the opinion of the court:

> "This is an appeal from a conviction and sentence under a count of an indictment charging wilful and corrupt obstruction of justice in violation of 18 U.S. C.A. section 135. Appellant is one R. H. Nye, who was charged with contempt of court because of the **same obstruction of justice** in a case which was before this court in *Nye v. United States,* 113 Fed. (2d) 1006, and before the Supreme Court in *Nye v. United States,* 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 872. The Supreme Court held that the conduct of Nye and one Mayers, who was charged with him, could not be punished as a contempt of court under 28 U.S.C.A. section 385, but that if the facts found in that case were taken to be true, it was 'highly reprehensible' and 'of a kind which corrupts the judicial process and impedes the administration of justice.' Following this, Nye and Mayers were indicted under a bill of indictment containing two counts, the first charging con-

spiracy to obstruct justice and the second charging the obstruction of justice."

It will thus be observed that the indictment in the Nye case was based upon matters and things that had occurred in the **same court** in a proceeding there pending and which had been before the Supreme Court, whose opinion was a matter of judicial knowledge. More, the district court could likewise take judicial notice that it had alleged obstruction of justice occurred. But it is settled beyond all cavil that courts do not take judicial notice of proceedings in **other** courts. A federal district court will take judicial notice of the affirmance of its own judgment by the Supreme Court of the United States (*In re Durrant*, 84 Fed. 314) as a matter of general notoriety, but otherwise federal courts do not take judicial notice of the records of **other federal courts.**

In re Manderson, 51 Fed. 501;
Fitzgerald v. Evans, 49 Fed. 426.

Moreover, both of the decisions cited by counsel for the government are from other circuits, and are clearly not binding on this court. As is well said in *Mast v. Stover Mfg. Co.*, 177 U.S. 485, 20 S.Ct. 708, 44 L.Ed. 856:

> "Comity is not a rule of law, but of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. **But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent**

> **increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command.** It declares not how a case **shall be** decided, but how it **may** with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, **to decide them right.** In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. **It demands of no one that he shall abdicate his individual judgment,** but only that deference shall be paid to the judgments of other coordinate tribunals."

See to the same effect *Norwich Union Fire Ins. Co. v. Stanton,* 191 Fed. 813.

This court, we submit, should not follow statements in the opinions of other circuit courts of appeals which advance no reason in either principle or authority for their conclusions, and which are in irreconcilable conflict with the overwhelming, and, indeed, well nigh unanimous, authority of the federal decisions to the effect that the federal courts are of limited jurisdiction, that the presumption is always against their jurisdiction, and that the facts necessary to establish that jurisdiction must be fully and distinctly alleged in all proceedings in which it is involved.

This brings us to the statement and discussion of those well settled principles.

(a) EVERY PRESUMPTION IS AGAINST THE JURISDICTION OF A FEDERAL COURT.

In the absence of any averment of facts sufficient to show that the federal district court in Nevada had jurisdiction of the cause alleged to have been pending before it, the presumption is that it **did not** have jurisdiction.

> "The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed."
>
> *Chicot Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317.

> "Lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties."
>
> *United States v. Griffin*, 303 U.S. 226, 82 L.Ed. 764.

In *Ex parte Smith*, 4 Otto 455, 24 L.Ed. 165, Chief Justice Waite says:

> "The facts upon which the jurisdiction of the courts of the United States rests must, in some form, appear in the record in all suits prosecuted before them. To this rule there are *no exceptions.* * * * *There are no presumptions in favor of the jurisdiction of the courts of the United States.*"

The rule, which is absolute, and which is pronounced by the decisions without dissent, is that the presumption is **against** the jurisdiction of a federal court in any particular case, **throughout** the case, and at **every stage** thereof, unless and until the contrary **affirmatively** appears.

Norton v. Larney, 266 U.S. 511, 45 S.Ct. 145, 69 L.Ed. 413;

Young v. Main, 72 Fed.(2d) 640;

Davidson v. Rafferty, 34 Fed.(2d) 700;

Ward v. Morrow, 15 Fed.(2d) 660;

New York Life Ins. Co. v. Kaufman, 78 Fed.(2d) 398;

Town of Lantana v. Hopper, 102 Fed.(2d) 108;

Bors v. Preston, 111 U.S. 252, 4 S.Ct. 407, 28 L.Ed. 419;

United States v. Green, 107 Fed.(2d) 19;

Hurley v. Wells-Newton, 49 Fed.(2d) 914;

Highway Construction Co. v. McClelland, 14 Fed. (2d) 406;

Danks v. Gordon, 272 Fed. 821;

Thomas v. Ohio State University, 195 U.S. 207, 25 S.Ct. 24, 49 L.Ed. 160;

King Iron Bridge Co. v. Otoe County, 120 U.S. 225, 7 S.Ct. 552, 30 L.Ed. 623;

Continental Ins. Co. v. Rhoads, 119 U.S. 237, 7 S.Ct. 193, 30 L.Ed. 380.

A long line of cases in the Federal Supplement adheres to this rule, but we believe that nothing can be added by citing the decisions of *nisi prius* courts.

(b) IN ALL CASES THE JURISDICTIONAL FACTS MUST BE DISTINCTLY ALLEGED.

Since the federal courts are courts of limited jurisdiction, their jurisdiction will not be presumed, but must appear in the record affirmatively and positively, and cannot be inferred argumentatively. Jurisdiction, or the facts upon which, in legal intendment, it rests, must be distinctly and positively alleged in the pleadings.

54 *Am. Jur.* 767, citing in the footnotes at least two score cases, including many heretofore cited in this brief.

Nowhere is the rule better stated than by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 8 L.Ed. 885:

> "The decisions of this court require that the averment of jurisdiction shall be positive, that the declaration shall *state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from the averments.*"

So strong is the presumption against the jurisdiction of the federal courts that it is settled by the highest court in the land that, even where the pleadings sufficiently allege jurisdiction, the burden of establishing the jurisdiction is upon the plaintiff throughout the case, and where the federal jurisdiction invoked by the plaintiff is challenged in any appropriate manner, **the burden is upon him to sustain the jurisdiction.**

Thomson v. Gaskill, 315 U.S. 442, 62 S.Ct. 68, 86 L.Ed. 951;

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135.

In the case last cited Chief Justice Hughes uses the following language:

> "The Act of 1875 prescribes a uniform rule and there should be a consistent practice in dealing with jurisdictional questions. We think that the terms and implications of the Act leave no sufficient ground for varying rules as to the burden of proof. The prerequisites to the exercise of jurisdiction are specifically defined, and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his

favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged, the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegation by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty."

We submit that, in view of this vast array of authorities, it must be presumed that the United States District Court for the District of Nevada did not have jurisdiction of the case of *United States v. Judd and Beatty,* and that the Information, containing, as it does, no jurisdictional

averments, does not charge an offense against the United States.

II.

THE INFORMATION IS VOID FOR LACK OF A VERIFICATION BY ONE HAVING KNOWLEDGE OF THE FACTS

This matter we discussed at length in the opening brief for appellant, citing *United States v. Collins*, 79 Fed. 65, decided on this circuit, and *Johnston v. United States*, 87 Fed. 187, decided by the Circuit Court of Appeals on the Fifth Circuit.

In the case of

Ex parte Spears, 88 Cal. 640,

the same question is dealt with by Judge De Haven, of the Supreme Court of the State of California, afterward a United States District Judge for the Northern District of California, in considering the sufficiency of an affidavit in an extradition case. It is there said:

> "It is obvious that this affidavit does not directly charge that petitioner has committed any offense, and it would be a dangerous precedent to establish, that any man may be deprived of his liberty and removed to another state upon such an accusation."

The learned justice quotes with approval the language of the Supreme Court of Michigan in *Swart v. Kimball*, 43 Mich. 451:

> "Charges are not verified by an affidavit that somebody is informed and believes that they are true. This is mere evasion of the law; the most improbable stories may be believed of any one, and the man most

> free from any reasonable suspicion of guilt is not safe if he holds his freedom at the mercy of any man three hundred miles off, who will swear that he has been informed and believes in his guilt."

It is argued by the United States Attorney that the verification of the Information in the case at bar is not within the rule of the foregoing decisions because the investigator states that the facts are true of his own knowledge. We dealt with this contention in the appellant's opening brief, by showing that the testimony in the case reveals the fact that Whitfield was not present at any of the occurrences testified to by the witnesses or on any occasion when any threats were alleged to have been made to Haliman, the witness claimed to have been threatened. Whitfield was not called as a witness, as he assuredly would have been if he had possessed any personal knowledge of the threats. If he knew anything whatever to be the case of his own knowledge, he would have furnished valuable corroboration for Haliman, whose testimony was impeached by the fact that he was an ex-convict.

It is absurd to say that the hearsay rule can be circumvented by the device of a false affidavit by a government agent who states that the facts are true of his personal knowledge when he obviously had no such knowledge.

III.

THE ERRONEOUS ADMISSION OF TESTIMONY TENDING TO ESTABLISH OTHER OFFENSES

This subject was sufficiently covered in the opening brief and little need be added here. Suffice it to say that this evidence does not fall within any of the exceptions to

the general rule which excludes alleged collateral offenses from the consideration of the jury. Such evidence is admissible only where it tends to show identity, intent, motive or guilty knowledge. There was no question as to any of these matters. If the defendant made the threat which in the Information he was charged with making, there was no question as to the motive with which the threat was made, the intent or the knowledge. There was likewise not the slightest question as to the identity of the defendant. If the jury had believed the testimony of the defendant that he did not make the threat, then of course the admitted evidence was not only incompetent and immaterial, but highly prejudicial.

CONCLUSION

For the reasons herein as well as in the opening brief assigned, it is respectfully submitted that the judgment should be reversed and the cause remanded to the District Court with directions to quash and dismiss the Information.

Dated: April 1, 1946.

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